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No. 944

# In the Supreme Court of the United States

October Term, 1957

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LA SALLE STEEL COMPANY, a corporation,
PETITIONER

*v.*

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian

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***On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit***

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The initial memorandum opinion of the District Court (Pet. 3a-4a) is reported at 140 F. Supp. 353. The supplemental memorandum opinion of the District Court (Pet. 5a) is unreported. The opinion of the Court of Appeals (Pet. 6a-9a) is reported at 250 F. 2d 607.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1957. A timely petition for rehearing was denied on February 7, 1958. The petition for a writ of certiorari was filed on April 22, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether the Alien Property Custodian is empowered under Sections 5(b) and 7(c) of the Trading with the Enemy Act to effect a summary seizure of a fund by the issuance of a turnover demand therefor, although the prior vesting order seized merely the enemy's right, title, and interest in the contract out of which the fund arose.

## STATUTE INVOLVED

The relevant portions of Sections 5(b) and 7(c) of the Trading with the Enemy Act (50 U.S.C. App. 5(b), 7(c)) are set forth in Appendix A to the petition.

## STATEMENT

This action was brought by the Attorney General, as Successor to the Alien Property Custodian,[1] under

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[1] By Executive Order 9788 (11 F.R. 11981, October 15, 1946), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

Section 17 of the Trading with the Enemy Act (50 U.S.C. App. § 17) and Title 28 U.S.C. § 1345, to require petitioner to pay over to him a royalty fund in the amount of $21,377.29. The undisputed facts are as follows:

On December 2, 1933, petitioner entered into a patent license agreement with Tubus A.G. of Switzerland under which petitioner was granted the exclusive right to manufacture, and the right to sublicense the manufacture of, certain types of products covered by patents and patent applications owned by Tubus (App. 2, 3, 6-8, 21). Tubus was paid $13,750 as advance royalties to be credited against initial production (App. 3, 21). Petitioner, itself, never produced under the exclusive license, but it sublicensed two domestic corporations to manufacture the products (App. 3, 4, 21, 22, 72-74).

In 1944, the Custodian issued Vesting Order 3369 under which he seized, *inter alia*, the patents which were the subject matter of the 1933 agreement and "all interests and rights (including all royalties and other monies payable * * * )" created in Tubus by reason of the 1933 agreement, finding that such property was owned by enemies (App. 4, 11, 14-16, 22).

Upon termination of the 1933 agreement on January 30, 1950, petitioner's sublicensees had manufactured 21,840.936 tons of products for which they had paid the petitioner almost $94,000 (App. 5, 6, 74, 99-102). The total royalties payable by the petitioner under the terms of the 1933 agreement amounted to $35,127.29, and, after crediting peti-

tioner with the $13,750 advance royalty payment, the net amount due under the contract was $21,377.29 (App. 6, 23, 74).

Following petitioner's refusal to pay over to the Custodian the royalty fund of $21,377.29, the Custodian, on February 21, 1952, issued a turnover directive demanding that this sum be paid to him (App. 99-102). When petitioner refused to comply with the turnover demand, this suit was brought.

The Custodian's complaint, as petitioner recognized (App. 129-130), was based on two alternative theories of recovery. One theory was that the fund of $21,377.29 had been *res* vested pursuant to the 1944 right, title, and interest vesting order, supplemented by the 1952 turnover demand. The other theory was that the Custodian, as successor to Tubus' rights under the 1933 agreement (pursuant to the 1944 right, title and interest vesting order) was entitled to recover the net amount of the royalties due under the 1933 contract, plus interest thereon (App. 2-20).

Petitioner's answer raised two affirmative defenses: (1) that the contract was illegal under the anti-trust laws, and (2) that the underlying patent was invalid (App. 23-26). It also counterclaimed for damages (App. 26-29). The Custodian moved to strike the affirmative defenses (App. 29-30). The District Court, in its memorandum opinion of February 10, 1956, concluded that the Custodian had vested the $21,377.29 fund by the original vesting order, supplemented by the later turnover demand,

and that the affirmative defenses were not available to petitioner. It accordingly granted the motion to strike (App. 120-121).

On March 20, 1956, petitioner asked for clarification of the District Court's memorandum opinion, seeking to ascertain whether the court had treated the action as a summary one to enforce a *res* vesting (in which concededly no defenses could be asserted) or as a plenary one (in which defenses could be asserted and the Custodian's right to the $21,377.29 as owner would be determined on the merits) (App. 124-132). Petitioner acknowledged that if the action was one to obtain summary possession of a fund which had been *res* vested, the District Court's decision of February 10 ended the case and that judgment in favor of the Custodian in the amount of $21,377.29 should be entered (App. 136).

The District Court, in its supplemental memorandum of August 2, 1956, held that "plaintiff here was attempting, in a summary proceeding, to enforce a turnover demand for a vested fund" (App. 138). Accordingly, it entered judgment requiring petitioner to comply forthwith with the Custodian's vesting order and turnover demand by paying over the fund of $21,377.29 (App. 139).

The Court of Appeals affirmed, citing *Zittman* v. *McGrath*, 341 U.S. 446, and *Zittman* v. *McGrath*, 341 U.S. 471 (Pet. App. 9a).

## ARGUMENT

The decision below is in accord with settled principles of alien property law relating to the Cus-

todian's seizure powers under Sections 5(b) and 7(c) of the Trading with the Enemy Act. This Court's decisions in *Zittman* v. *McGrath*, 341 U.S. 446 (*Zittman No. 1*), and *Zittman* v. *McGrath*, 341 U.S. 471 (*Zittman No. 2*), are dispositive. The Court there held that, notwithstanding the original issuance of a right, title and interest vesting order seizing the enemy's interest in a fund, the Custodian was empowered to issue a later turnover directive in order to possess himself of the entire fund for administration under the Act. This holding was reaffirmed in *Brownell* v. *Singer*, 347 U.S. 403,[2] in which the Court, relying on *Zittman No. 2*, reversed *per curiam* a judgment of the New York Court of Appeals holding that the Custodian was not entitled to possession of a fund *res* vested by a turnover directive served seven years after the issuance of the original vesting order. For other cases enforcing the Custodian's right to summary possession of property seized pursuant to turnover demands following "interest" vestings, see *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y.S. 2d 289; *In re Daly's Estate*, 189 Misc. 680, 74 N.Y.S. 2d 711; *In re Young's Estate*, 204 Misc. 92, 118 N.Y.S. 2d 803; see, also,

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[2] The case originated in the Supreme Court, New York County, *sub nom. In re Yokohama Specie Bank, Ltd.*, 200 Misc. 610, 103 N.Y.S. 2d 228. The judgment was affirmed without opinion by the Appellate Division, First Department, 280 App. Div. 970, 116 N.Y.S. 2d 926. The New York Court of Appeals also affirmed without opinion, 305 N.Y. 908, 114 N.E. 2d 469. For the prior phase of this litigation in this Court, see *Lyon* v. *Singer*, 339 U.S. 841.

Bishop, *Judicial Construction of the Trading with the Enemy Act*, 62 Harv. L. Rev. 721, 733-734.

The Custodian proceeded here precisely in the same manner as in *Zittman No. 2* and in *Brownell* v. *Singer*.[3] Following the issuance of the right, title and interest vesting order seizing the enemy's rights under the 1933 contract (including the right to royalties), he issued a turnover directive calling upon petitioner to yield possession of royalties determined to be due under the 1933 contract.[4]

If petitioner wishes to contest the Custodian's finding that the royalty fund was enemy-owned, it has a full remedy, as the District Court's judgment plainly recognized (see App. 139): suit under Section 9(a). Certainly, it has been settled since World War I that the correctness of the Custodian's determinations may not be litigated in the course of his action under Section 17 to obtain possession. *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554; *Stoehr* v.

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[3] In view of the controlling effect of the *Zittman* cases and *Brownell* v. *Singer*, *supra*, there could be no conflict between the decision below and *In re Sutherland*, 23 F. 2d 595 (C. A. 2), as petitioner asserts (Pet. 11). Moreover, in *Sutherland* the fund of dividends was not in existence when the seizure of the stock was made and no turnover directive was issued with respect to the fund after it arose. Here, on the other hand, the royalty fund was in existence when the 1952 turnover directive was issued and served.

[4] Contrary to petitioner's present position (Pet. 10), there was never any question raised below as to the quantum of production by petitioner's sublicensees or as to the amount of royalties which were due under the specific terms of the agreement. Indeed, these facts were always conceded by petitioner (App. 74, 128, 129).

*Wallace*, 255 U.S. 239; *Commercial Trust Co.* v. *Miller*, 262 U.S. 51; *Zittman* v. *McGrath*, 341 U.S. 471.[5]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1958.

[5] Petitioner's references (Pet. 2, 10, 11) to Section 12 of the Act are inapposite. That section, on its face, relates to the administration of property which comes into the Custodian's hands; it has no bearing on the scope of the Custodian's seizure powers or upon the methods by which he may make seizure effective.

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